No. 12-10

IN THE

Supreme Court of the United States

UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT, *et al.*,

Petitioners,

v.

ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE RUTHERFORD INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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246801

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QUESTION PRESENTED

Whether the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003, 22 U.S.C. § 7631(f), which requires an organization to have a policy explicitly opposing prostitution and sex trafficking in order to receive federal funding to provide HIV and AIDS programs overseas, violates the First Amendment.

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INTEREST OF *AMICUS CURIAE*

Amicus curiae the Rutherford Institute is an international civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened, and in educating the public about constitutional and human rights issues. Attorneys affiliated with the Institute have represented parties and filed *amicus curiae* briefs in this Court on numerous occasions.[1]

The Rutherford Institute works to preserve the most basic freedoms of our Republic. Perhaps the most important of these freedoms is the right to be free from government interference with the beliefs one holds and the positions one espouses. This central freedom is the bedrock on which the First Amendment rests.

While Congress has authority to control the ways in which federal dollars are used by private recipients, this case goes far beyond that power. The Rutherford Institute filed an *amicus* brief in *Rust v. Sullivan*, 500 U.S. 173 (1991), arguing—correctly—that Congress may prohibit the use of federal funds to perform or advocate the performance of abortions without running afoul of

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1. Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part; and no person or entity, other than *amicus curiae* and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. This brief is filed with the written consent of all parties pursuant to this Court's Rule 37.3(a). Copies of the requisite consent letters have been filed with the Clerk of this Court.

the First Amendment. This case is not like *Rust*. Not content with *proscribing* activity and speech that could undermine the Leadership Act, the government claims the right to force grant recipients to internalize and adopt *as their own* a government view on virtually any issue that it deems relevant to a broader program agenda, and (most remarkably) to do so with virtually no First Amendment scrutiny.

This case involves forcing private entities to take a position opposing prostitution and sex-trafficking, scourges the Rutherford Institute abhors.[2] The relatively uncontroversial content of this policy should not obscure what is at stake. The Rutherford Institute is troubled by the government's attempt to seize power to control private speech and belief, through a virtually limitless Spending Clause authority and a dramatic expansion of the government speech doctrine. The power claimed by the government to require express policy agreements, free from First Amendment scrutiny, is novel. It would authorize all manner of forced statements of belief so long as they are attached to government spending. In an era of increasing government reach, the government must show more than expedience in order to compel professed loyalty to its preferred views.

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2. *See, e.g.*, John W. Whitehead, *America's Dark Side: Sexual Trafficking of Women* (Mar. 8, 2004), https://www.rutherford.org/publications_resources/john_whiteheads_commentary/americas_dark_side_sexual_trafficking_of_women; John W. Whitehead, *The Evil Flesh Trade in Young Children* (Sept. 30, 2002), https://www.rutherford.org/ publications_resources/john_whiteheads_commentary/the_evil_flesh_trade_in_young_children.

STATEMENT OF THE CASE

The Rutherford Institute adopts by reference the statement included in the Respondents' Brief.

SUMMARY OF THE ARGUMENT

This case involves a novel and intrusive requirement on certain private recipients of federal Leadership Act funding to adopt *as their own* a government-mandated policy position. Recipients must explicitly state that they are "opposed to the practices of prostitution and sex trafficking" and agree with the government that this opposition is "because of the psychological and physical risks they pose for women, men, and children." 45 C.F.R. § 89.1(b); *see also* 22 U.S.C. § 7631(f). The Policy Requirement in no way resembles the narrow restrictions on the use of federal funds to conduct activities that this Court has sanctioned previously. Indeed, such restrictions are already in the Leadership Act, and are not a part of this challenge. And the Policy Requirement is wholly unlike "government speech" initiatives that the government can selectively fund and control.

Because the Policy Requirement does not fit within existing authority, the government stretches to support an expansive view of its power. The government claims authority to require expressions of personal policy agreement, so long as the demand is attached to spending and is not overtly designed to *suppress* "disfavored" speech. This approach would insulate a wide swath of compulsions from First Amendment review, so long as they satisfy the relatively lax demands of the Spending Clause. Such a broad grant of power over the beliefs of

private citizens is antithetical to the fundamental purpose of the Free Speech Clause.

Compelled speech requirements—political, artistic, religious, scientific, or commercial—are *presumed* to be unconstitutional. The burden rests on the *government* to justify its impositions, and for good reason. If the government can readily require private parties to adopt its viewpoints with virtually no First Amendment review, its reach expands while accountability diminishes.

The government invokes the relatively new and narrow "government speech" doctrine to help it immunize the Policy Requirement from First Amendment scrutiny. But neither the Leadership Act nor the Policy Requirement qualifies as "government speech." Were "government speech" expanded to justify forced expressions of agreement related to the Leadership Act, there would be virtually no limit to the government's ability to demand that private entities adopt government views on a variety of subjects. Under the government's rationale, its ability to purchase fealty to its favored views would be nearly limitless as the reach of federal funding expands.

- Housing grants under a program to reduce homelessness could be conditioned on an expression of agreement with the wisdom of individuals finishing high school, getting a job, and waiting until marriage to have children because these behaviors have been shown to reduce the risk of poverty.[3]

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3. *See, e.g.*, NYC Human Resources Administration Department of Social Services, *Think Being a Teen Parent Won't Cost You? http://www.nyc.gov/html/hra/html/programs/teen_pregnancy_campaign.shtml* (last visited Mar. 31, 2013) (New York City public awareness campaign).

- A recipient of agricultural subsidies could be required to expressly agree with, and adopt a position advocating, a government statement that organic food is better for human health and the environment, because it "can provide an additional avenue for climate change mitigation through such measures as enhanced soil carbon sequestration."[4]

- Recipients of grant money under programs to reduce school violence could be required to adopt a policy supporting revisions to state mental health policies to make it easier for the dangerous mentally ill to be involuntarily committed, because such changes would increase the number of people federally disabled from firearm ownership under 18 U.S.C. § 922(g)(4).[5]

These requirements would be virtually exempt from First Amendment review under the government's approach. In an era of expanding entanglement between government, private citizens and organizations, Congress and the Executive must be held to the standards imposed by the First Amendment. Government should not be allowed to use the public fisc to purchase agreement in the marketplace of ideas.

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4. Elisa Morgera et al., U.N. Food & Agric. Org., *Organic Agriculture and the Law* v (2012), *available at* http://www.fao.org/organicag/oa-publications/pub-cat/sustainability-and-perspectives/en/.

5. *See generally,* Nat'l Conference of State Legislatures, *Possession of a Firearm by the Mentally Ill* (Jan. 2013), http://www.ncsl.org/issues-research/justice/possession-of-a-firearm-by-the-mentally-ill.aspx (describing federal firearms disability and state laws).

ARGUMENT

I. The First Amendment Protects Private Parties From Being Forced To Adopt Government Views.

A. Forced Speech Is Presumed Unconstitutional.

The First Amendment guarantees "both the right to speak freely and *the right to refrain from speaking at all*." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (emphasis added). Any law that "requires the utterance of a particular message favored by the Government" thus "contravenes this essential right." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994).

Such compulsions are subject to exacting scrutiny because the government may not "require[] affirmation of a belief and an attitude of mind," or demand that Americans "profess any statement of belief," even if doing so does not require the person to "forego any contrary convictions of their own." *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633–634 (1943). Our "system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts." *Wooley*, 430 U.S. at 714.

Governments often defend their requirements by arguing that First Amendment concerns are addressed by "attribution" to the government or "non-attribution" to the private speaker, which makes clear that any compelled speech does not represent the views of the speaker. Petitioners admit that Respondents are not required to publicly convey any purported government message. *See, e.g.* Pet. Br. 22, 27. But even if this case did involve

a public message, the Policy Requirement could not be defended on any "non-attribution" theory, because the Policy Requirement requires personal adoption by the organization.

This Court has made clear that forced speech is not cured by a disclaimer that the speech is not that of the conscripted party. *See, e.g., Pac. Gas & Elec. Co. v. Pub. Utilities Comm'n of California*, 475 U.S. 1, 16 n.11 (1985) ("*PG&E*") ("The disclaimer serves only to avoid giving readers the mistaken impression that TURN's words are really those of appellant. It does nothing to reduce the risk that appellant will be forced to respond when there is strong disagreement with the substance of TURN's message.") (citations omitted).

This Court thus has rejected the argument that forced speech is permissible so long as it "does not compel an objecting party (here a corporate entity) itself to express views it disfavors; and the mandated scheme does not compel the expression of political or ideological views." *United States v. United Foods*, 533 U.S. 405, 411 (2001) (rejecting arguments in support of forced marketing assessment). Even where the government is engaged in *advertising* of its own, this Court has found it important that the program did not "require[] attribution" to a private party. *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 564 (2005) (noting possible challenge to forced subsidy if "individual beef advertisements were attributed to" objecting private party). Attribution thus is often a critical part of the analysis of compelled speech.

Remarkably, however, the Policy Requirement makes no attempt to hide behind the typical "non-attribution" defense. Indeed, it boldly requires precisely the evil that

this Court described in *Barnette*: that a private party is required to express "affirmation of a belief and an attitude of mind." *Barnette*, 319 U.S. at 633.[6] The Policy Requirement must be *adopted as the private parties' own*. This is what makes the requirement here so novel and dangerous.

B. The First Amendment Constrains The Spending Power.

"The First Amendment is a limitation on government, not a grant of power. Its design is to prevent the government from controlling speech." *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 695 (1992) (Kennedy, J., concurring). The First Amendment restrains the coercive power of government and ensures democratic accountability.

As the Supreme Court reaffirmed recently, the government "can express [its] view through its own speech," but "may not burden the speech of others in order to tilt public debate in a preferred direction." *Sorrell v.*

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6. The government tries to minimize the requirement by arguing that the affirmation need only be made to government agencies, not to the general public. Pet. Br. 43 n.6, 44. This does not fix the problem. The profession of agreement is a binding representation to the government designed to ensure the recipient adopts and adheres to a position that is the same as the government's. It smacks of loyalty oaths administered by bureaucrats. *Cf. Speiser v. Randall*, 357 U.S. 513 (1958) (striking down condition of tax exemption requiring that veterans declare on form filed with tax assessor that they did not advocate the forcible overthrow of government). A government that can demand expressions of belief to it can equally demand expressions of belief to others.

IMS Health, Inc., 131 S. Ct. 2553, 2671 (2011); *see also PG&E*, 475 U.S. at 13-14 (rejecting requirement that utility give third parties access to utility's newsletter). This is because "[w]hen the government speaks . . . it is, in the end, accountable to the electorate and the political process for its advocacy." *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541-42 (2001) (quoting *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000)).

When the government forces private parties to adopt its subjective position *as the private parties' own*, it violates individual liberty. By interfering with privately held beliefs, the government also manipulates debate in a way that limits democratic accountability. To protect against this, the First Amendment requires the government to justify its impositions.

The First Amendment demands this even when the government acts under the Spending power. In *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47 (2006) ("*FAIR*"), the Court rejected a First Amendment challenge to the Solomon Amendment's requirement that recipients of federal education money provide equal access to military recruiters. The Court made equally clear that the Spending Clause does not grant Congress free rein to interfere with First Amendment rights. *See id.* at 59. The Court acknowledged that the obligation would have been unconstitutional "if Congress could not directly require universities to provide military recruiters equal access to their students," placing great weight on Congress's separate power to raise armies. *Id.* The Court also found that the Solomon Amendment's impact on speech was "incidental" to a limitation on conduct. *Id.* at 62. Finally, the Court noted that the access obligation did not interfere "with [the]

speaker's desired message." *Id.* at 63. *FAIR* shows that reliance on the Spending Clause alone will not immunize from First Amendment review a speech regulation that compels private expression.

Here, far from being merely "incidental" to a limitation on conduct, the Policy Requirement's impact on speech is the whole point of the provision. Respondents are not required merely to "accommodate" government action or refrain from speech or activity that interferes with the program. Respondents must adopt the government's subjective policy position and reasoning as *their own*. This deserves searching First Amendment review.

II. The Government Speech Doctrine Does Not Save The Policy Requirement.

This Court has recognized only a few exceptions to the First Amendment's condemnation of forced speech. The Rutherford Institute focuses on the "government speech" aspect of the case.

The Solicitor General's brief seems to invoke the government speech doctrine to justify the Policy Requirement, but it is inapplicable.[7] The nascent "government speech" doctrine seeks to accommodate the government's prerogative to control its message when it speaks on its own. It is a recognition that "[t]he Government's own speech . . . is exempt from

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7. *Amicus* for Petitioners, American Center for Law and Justice, agree. *See* ACLJ Br. 11 ("Here, however, the anti-prostitution and anti-sex trafficking policy the government requires of grantees is not *government* speech, but rather a policy *the grantee itself* must have.") (emphasis in original).

First Amendment scrutiny." *Johanns*, 544 U.S. at 553. A government entity has the right to "speak for itself." *Southworth*, 529 U.S. at 229. And when it speaks, the government "is entitled to say what it wishes," *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995), and to select the views that it wants to express. Where—unlike this case—government speech is involved, "[a] government entity may exercise this same freedom to express its views when it receives assistance from private sources for the purpose of delivering a government-controlled message." *Pleasant Grove City v. Summum*, 555 U.S. 460, 468 (2009) (citing *Johanns*, 544 U.S. at 562).

Thus, "where the government controls the message, 'it is not precluded from relying on the government-speech doctrine merely because it solicits assistance from nongovernmental sources'" *id.* (citing and quoting *Rosenberger*, 515 at 833), and the "government entity may 'regulate the content of what is or is not expressed . . . when it enlists private entities to convey its own message,'" *id.* (citing and quoting *Rosenberger*, 515 U.S. at 833).

The doctrine has been characterized as a "defense" that "insulates the government's own expressive choices from free speech clause challenges by private speakers seeking to prevent or alter the delivery of the government's own message." Helen Norton, *Government Speech in Transition*, 57 S.D. L. Rev. 421, 421 (2012). The defense depends on the government using private speakers to disseminate *the government's own message* in ways not present here. In fact, "the government should lose when the character of the speech is at issue and its governmental nature has not been made clear." *Summum*, 555 U.S. at 485 (Souter, J., concurring).

A. The Leadership Act And Policy Requirement Are Not Government Speech

Perhaps because of its poor compatibility, the Solicitor General flirts with the government speech doctrine but does not fully embrace it. The government uses dicta from *Rosenberger* to assert that "when the government 'enlists private entities to convey its own message . . . the private speakers are not entitled to transmit the message in a way that distances themselves from it or even indicates their own lack of agreement with it." Pet. Br. 31 (citations omitted).[8] The government suggests that whenever it spends money in support of a policy, the government speech doctrine allows it to require recipients to hold *as their own* preferred messages consistent therewith.

The Court has "provided very little guidance as to what constitutes government speech," *Wells v. City & Cnty. of Denver*, 257 F.3d 1132, 1140 (10th Cir. 2001), but

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8. Until *Johanns*, *Summum*, and *FAIR*, the "government speech" doctrine was little more than dicta from decisions ruling in favor of private speech rights. The doctrine finds its foundation in public forum cases analyzing speech *restrictions* and ruling *against* the government. *See Summum*, 555 U.S. at 468 (citing *Southworth*, 529 U.S. 217 (2002) (analogizing student activities fund to public forum and determining that viewpoint neutrality requirement was sufficient to protect objecting students' rights); *Rosenberger*, 515 U.S. 819 (1995) (analogizing student activities fund to a "metaphysical" forum and finding University may not silence student expression of certain viewpoints)). The government invokes language from *Velazquez*, Pet. Br. 22, but that also involved public forum analysis. The Court held that the government could not condition funding of legal services on a prohibition against lawyers making arguments to challenge federal law. *Velazquez*, 531 U.S. at 548-49. If anything, *Velazquez* shows the limits of funding conditions.

the Policy Requirement is wholly unlike situations where this Court has found "government speech." Recipients of public funding must adopt a policy explicitly opposing prostitution *on their own behalf* and are not required to express that message to any audience except the government. The regime is not a government messaging scheme or a compelled subsidy of government speech. Combatting prostitution is at best a subsidiary goal. The government speech doctrine is not in play.

1. The regime is not a messaging scheme

The Leadership Act is directed at halting the HIV/AIDS pandemic, principally through medical care and disease prevention via conduct, including procurement of HIV/AIDS pharmaceuticals, food and nutrition programs, and related initiatives. The government asserts that the Policy Requirement is immune from First Amendment scrutiny because the government may "enlist private parties to convey its own message." Pet. Br. 21 (citing *Rosenberger*, 515 U.S. at 833). But neither the Leadership Act nor the Policy Requirement is a messaging program that can be characterized as "government speech."

Johanns illustrates this. *Johanns* involved a government advertising campaign encouraging the consumption of beef. *See* 544 U.S. at 553-55. The campaign was funded by cattle producers through a targeted assessment. Congress "set out the overarching message of the advertisements" and the Secretary of Agriculture approved each advertisement. *Id.* at 561. The advertising campaign constituted "speech," and the government's control over it made "government speech." *Id.* at 560-62.

That concept of "government speech" cannot reach the Leadership Act or the Policy Requirement. The Policy Requirement compels funding recipients to express a viewpoint on their own behalf, to the government. It therefore cannot be classified as the *government's* speech. Further, even if the Policy Requirement required public speech, the doctrine would not apply. The advertising "message" in *Johanns* was the essence of the program; it was determined and controlled by the government, and only *subsidized* by private funds. In distinguishing a permissible "compelled *subsidy*" of "government speech" from impermissible forced speech, the Court made plain its narrow approach to "government speech." *Id.* at 563-65. The Leadership Act and Policy Requirement are not a "messaging campaign" and cannot be considered "government speech."

2. The Leadership Act is not an "anti-prostitution" program

Putting aside the fact that the Leadership Act cannot be characterized as a "messaging" scheme, the subject of the Policy Requirement is in any event clearly *subsidiary* to the Act's primary purpose of treating and preventing HIV/AIDS.[9]

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9. The Leadership Act's legislative history confirms that the "addition of the Policy Requirement was ancillary to Congress' goal to provide funding for HIV/AIDS efforts." Garima Malhotra, *Good Intentions, Bad Consequences: How Congress' Efforts to Eradicate HIV/AIDS Stifle the Speech of Humanitarian Organizations*, 61 Cath. U. L. Rev. 839, 860 (2012) (citing *United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003: Markup Before the H. Comm. on Int'l Relations*, 108th Cong. 77, at 149 (statement of Rep. Smith, Vice Chairman, H. Comm. on Int'l Relations)).

If the Court sanctions re-casting a program's "message" based on the mere presence of an issue in statutory findings or limitations, the Leadership Act could as easily be re-cast as expressing a message of "support" for Ugandan President Museveni or denouncing international conflicts that displace persons as refugees. *See* 22 U.S.C. § 7601(20)(B) (extolling Museveni's leadership on HIV/AIDS issues); 22 U.S.C. § 7601(3)(C) (finding that women and children who are refugees or internally displaced are especially at risk for HIV infection due to their vulnerability to sexual exploitation). As the Second Circuit recognized, "if the government speech principle allowed Congress to compel funding on every subsidiary issue subsumed within a federal spending program, the exception would swallow the rule." *Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev.*, 651 F.3d 218, 238 (2d Cir. 2011).

3. The scheme requires attribution to Respondents, taking it outside of "government speech"

Even if the Policy Requirement compelled recipients to express a message to the public opposing prostitution as their own—which, as discussed, it does not—the government speech doctrine would still not apply. Under this counterfactual, the Leadership Act and Policy Requirement do not follow the typical model of attempting to separate a government message from that of the private speaker. In fact, the Policy Requirement would do precisely the opposite. By requiring personal adoption, it *requires attribution* of belief to private parties, forcing them to parrot the government's opinion in their own words, with no indication that their position was bought and paid for with government money. Attribution to the

government, rather than private parties, is at the core of the "government speech" doctrine. Viewed through this lens, the *raison d'etre* of the Policy Requirement would be attribution to private parties, because it requires the recipient to explicitly adopt the policy *as its own*. This is fatal even if the regime could be seen as constituting or supporting a messaging campaign.

This unique and novel requirement of private attribution on the part of recipients takes the Policy Requirement far outside those cases that allow the government to control *its own message*. In *Johanns*, this Court held that it was important that there was no indication that the government message would be attributed to private parties. *Id.* at 565. The challengers argued that "[c]ommunications cannot be 'government speech,' . . . if they are attributed to someone other than the government," *id.* at 564. The Court did not answer that argument because there was no risk of attribution, but noted "there might be a valid objection if those singled out to pay the tax are closely linked with the expression in a way that makes them appear to endorse the government message." *Id.* at 565 n.8 (quotes and citations omitted).[10] The Policy Requirement does not just "closely link[]"expression with the private speaker. It requires Respondents to adopt a particular view *as their own*.

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10. Justice Thomas noted in concurrence, "[t]he government may not, consistent with the First Amendment, associate individuals or organizations involuntarily with speech by attributing an unwanted message to them, whether or not those individuals fund the speech, and whether or not the message is under the government's control." *Johanns*, 544 U.S at 568 (Thomas, J., concurring).

Likewise, in *Summum*, this Court held that the public monument was government speech because viewers would understand that *the government was the speaker*. *See Summum*, 555 U.S. at 470. Conversely, by requiring Respondents to adopt the government's view *as their own*, the Policy Requirement is designed to obscure the fact that the government has purchased the private party's speech.

The concept of attribution has been important since *Rust*,[11] which upheld a prohibition on the use of federal funds to support abortion-related speech and activities because it did not "require a doctor to represent as his own any opinion that he does not in fact hold," *Rust*, 500 U.S. at 200. Here, Respondents are required to adopt the government's opinion *as their own*.

Requiring attribution of "government speech" to the government facilitates democratic accountability. As Justice Kennedy observed, "[w]hen the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy." *Southworth*, 529 U.S. at 235. When speech is not clearly the government's the public cannot hold the government accountable. For all these reasons, the government speech doctrine simply does not apply.

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11. *Rust* is dealt with at length in Respondents' brief. *See* Resp't Br. 29-30, 37-38, 42, 46-49. Suffice it to say, the Rutherford Institute sees no resemblance between the Policy Requirement and the program at issue in *Rust*.

B. The Policy Requirement Cannot Be Used As A Prophylactic Measure To Protect A Government Program

Under the government's theory, the Policy Requirement is simply a "legitimate and appropriate step" to ensure "that its message is neither garbled nor distorted by the grantee." Pet. Br. 21-22 (citing *Rosenberger*, 515 U.S. at 833). Even if the Leadership Act embodies a government "message" about prostitution (a stretch, as explained) the Policy Requirement is an unnecessary prophylactic, which must be subject to First Amendment scrutiny and rejected.

The Leadership Act already commands that none of its funds "may be used to promote or advocate the legalization or practice of prostitution or sex trafficking." 22 U.S.C. § 7631(e). While this restriction lies within the guideposts recognized in *Rust*, the Policy Requirement intentionally pushes much farther.

In the government's view, if private actors receiving Leadership Act grants do not express fealty to the government's view, it might be hard to police activity that *could* have an incidental effect on the government's claimed "message." The government explains, "[t]hat is especially true in light of the acute difficulties of monitoring the way in which private organizations provide HIV/AIDS programs and services throughout the world. The Policy Requirement helps to guarantee that the organizations receiving Leadership Act funds act consistently with Congress's goals in their overseas operations." Pet. Cert. 15-16. In other words, expedience justifies the Policy Requirement.

"[P]rophylactic rules in the area of free expression are suspect." *NAACP v. Button*, 371 U.S. 415, 438 (1963). Where more tailored options "are available," to serve identified interests, "prophylactic" speech compulsion is disfavored. *Riley v. Nat'l Fed'n for the Blind*, 487 U.S. 781, 800-01 (1988). More narrowly tailored options like vigorous enforcement of restrictions are "in keeping with the First Amendment directive that government not dictate the content of speech absent compelling necessity, and then, only by means precisely tailored." *Id.* at 800.

The government would relieve itself of the burden to show that Respondents' failure to *expressly adopt* the government's position actually threatens or has "distorted" any government message, anti-prostitution or otherwise. It is far from obvious that silence, particularly when coupled with the restrictions in Section 7631(e), carries any risk of message distortion, much less one sufficient to justify a forced expression of subjective agreement. Congress did not put forth evidence that such policy adoption was necessary, and as Respondents point out, the Policy Requirement has been enjoined for six years and the government provides no evidence that Respondents' private activities have diluted the government's purported message—anti-prostitution or otherwise. Cert. Reply 14.

If the government can avoid the First Amendment simply by claiming that the Policy Requirement is a "legitimate and appropriate" way to efficiently preserve the Leadership Act's "message" or goals, its power would be limitless. There is no "government speech" that needs protecting, but even if there were, the novel Policy Requirement is an inappropriate prophylactic.

III. The First Amendment's Restraints On Government Are Needed Now More Than Ever.

With increased federal spending and growing entanglement of public and private entities, the government's theory will leave entities doing business with the government virtually no recourse against compelled speech.

A. Government Is Expanding Its Reach Through Thousands Of Diverse Grants And Programs.

The federal government runs thousands of grant programs, with discretion over administration and eligibility scattered throughout twenty-six grant-making agencies.[12] "The federal government's use of grants to achieve national objectives and respond to emerging trends . . . has grown significantly in the last two decades." U.S. Gov't Accountability Office, GAO-11-773T, *Federal Grants: Improvements Needed in Oversight and Accountability Processes* 3 (2011).

Grants reach a variety of sectors, funding "training, research, planning, construction, and the provision of services such as health care, education, transportation, and homeland security." U.S. Gov't Accountability Office, GAO-11-478, *Grants.gov: Additional Action Needed to Address Persistent Governance and Funding Challenges* 1 (2011). The 2012 Catalog of Federal Domestic Assistance provides

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12. *See* Grants.gov, http://www.grants.gov/applicants / recovery.jsp (last viewed Apr. 1, 2013). The federal government's grant management portal demonstrates the array of grants to which strings could be attached.

information on over 2200 domestic grant programs.[13] From Pell grants to "Postconviction DNA Testing," "Renewable Energy Research and Development," and "Infant Adoption Awareness Training," the government is allocating increasing resources to universities, non-profits, local governments, small businesses and individuals that are more and more dependent on that funding.[14]

Public-private partnerships similarly leverage federal and private resources to accomplish a wide range of objectives. *See* U.S. Dep't of Health & Human Servs., *The Leveraging Handbook: An Agency Resource for*

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13. *See* Catalog of Federal Domestic Assistance, https://www.cfda.gov/ (last viewed Mar. 31, 2013).

14. The Urban Institute's Center on Nonprofits and Philanthropy released a national survey that estimated "government agencies have approximately 200,000 formal agreements (contracts and grants) with about 33,000 human service nonprofit organizations," and that "60 percent of organizations with government grants and contracts count those grants and contracts as their largest funding source." Elizabeth T. Boris et al., *Human Service Nonprofits and Government Collaboration: Findings from the 2010 National Survey of Nonprofit Government Contracting and Grants* (2010), *available at* http://www.urban.org/publications/412228.html. Universities and local governments also depend on federal funding. *See, e.g.*, Goldie Blumenstyk, *For-Profit Colleges Show Increasing Dependence on Federal Student Aid*, The Chronicle of Higher Education (Feb. 15, 2011) *available at* http://chronicle.com/article/For-Profit-Colleges-Show/126394/; David B. Muhlhausen, *Fire Grants: Do Not Reauthorize an Ineffective Program* 1 (Heritage Foundation 2012), *available at* http://www.heritage.org/research/reports/2012/11/fire-grants-do-not-reauthorize-femas-ineffective-program (explaining that grants create fire department dependence on federal funding).

Effective Collaborations 4 (2003).[15] While partnerships are critical to public policy, they involve the commingling of government and private resources.[16] This gives government an incentive to force private parties seeking needed grant money to adopt, endorse, and convey desired messages, instead of directing and funding its own speech.

B. Without The First Amendment As A Check, The Government Can Purchase Private Beliefs And Influence The Marketplace Of Ideas.

In the absence of robust First Amendment review, the government will be empowered to demand that private parties expressly agree with the government's views on almost any topic. The government would be foolish to pass on such cost-effective means of shoring up support for its messages.[17] It is not difficult to see where this leads.

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15. The Biomarkers Consortium, for instance includes the National Institutes of Health (NIH), the U.S. Food and Drug Administration (FDA) and private entities like as Pfizer, Abbott Laboratories, and Johnson & Johnson, to promote discovery of biological markers that aid disease prevention and treatment. *See* FDA, Public-Private Partnership Program, Biomarker Consortium, http://www.fda.gov/AboutFDA/PartnershipsCollaborations/PublicPrivatePartnershipProgram/ucm231115.htm.

16. *See generally* FDA, *Guidance for FDA Staff: The Leveraging Handbook* 5 (2003), *available at* http://www.fda.gov/ downloads/AboutFDA/CentersOffices/CDER/WhatWeDo/UCM121662.pdf ("FDA's operating environment is becoming more and more interconnected with other stakeholders.").

17. Not surprisingly, governments already are looking to expand the government speech doctrine to insulate regulation from review. For example, the City of New York invoked the

- Hospitals receiving research grants to prevent cancer could be required to agree with a government position opposing marijuana legalization, because marijuana "may promote cancer of the respiratory tract and disrupt the immune system."[18]

- Schools receiving government funding under a program to eradicate achievement gaps could be required to affirm support for school choice and vouchers[19] (or conversely support for union rights, depending on the government's view of how such policies improve educational opportunity).

- Recipients of cybersecurity research and development grants[20] could be required to expressly

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doctrine to insulate forced retail tobacco warnings from First Amendment review. *See* Brief of Defendants at 37, *23-34 94th St. Grocery Corp. v. New York City Bd. of Health*, 685 F.3d 174 (2d Cir. 2012) (No. 11-0091) (arguing warnings in retail stores constitute "government speech" because "[t]here is no question that the signage is the government's own speech, and, consequently, private individuals are not required to personally express any message").

18. Office of National Drug Control Policy, *What Americans Need to Know about Marijuana* 2 (2011), *available at* www.ncjrs.gov/ondcppubs/publications/pdf/mj_rev.pdf

19. *See, e.g.*, Caroline Hoxby, *School Choice and School Productivity (Or, Could School Choice be a Tide That Lifts All Boats?)*, National Bureau of Economic Research Working Paper No. 8873 (April 2002), *available at* http://www.nber.org/papers/w8873.

20. *See, e.g.*, Cybersecurity Act of 2012, S. 3414, 112th Cong. (2012) §§ 301-04 (establishing federal research and development funding on cyber security).

> agree that because China is a major source of attacks seeking to harm the United States, no economic cooperation should be pursued until China ceases and publicly renounces cyber-espionage.[21]

Under the government's approach, these and countless other demands could be imposed with virtually no First Amendment protection. A quick review of the thousands of grants available to individuals, non-profits, and others, *see supra* notes 12, 13, reveals the potential breadth of the government's position.

By contrast, the government's "Just Say No" and apartheid hypotheticals are unpersuasive. Pet. Br. 32-33. Indeed, they demonstrate how novel the Policy Requirement is. Instead of offering examples of existing demands like the Policy Requirement that might plausibly be jeopardized if Respondents prevail, the government conjures up hypotheticals based on earlier, more modest programs.[22]

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21. *See, e.g.*, Mandiant, *APT1: Exposing One of China's Cyber Espionage Units* (2013), *available at* http://intelreport.mandiant.com/ (attributing cyber-espionage to China).

22. The "Just Say No" public messaging campaign was initiated by First Lady Nancy Reagan and does not appear to have required grantees to express fealty to government views. *See, e.g.*, 42 U.S.C. § 290aa-12 (repealed 1992) (permitting the Secretary of Health and Human Services to grant money to private entities providing treatment, making no reference to express adoption of a government position). Similarly, Congress took action in the 1980s to combat apartheid through what looks like regulation of conduct, not thought. *See* Comprehensive Anti-Apartheid Act of 1986, 22 U.S.C. §§ 5001-5116 (repealed 1993) (requiring U.S. corporations that employed more than 25 people in South Africa to comply with

The government equates the Policy Requirement to a hypothetical in which the government funds a campaign urging kids to "Just Say No" to drugs and requires grantees to state they oppose drug use by children. First of all, that program's public message and the required private policy are coterminous. The example looks more like *Johanns* than the Policy Requirement, because the "Just Say No" program is a *messaging campaign* that (depending on its structure) is likely to be "government speech" while the Leadership Act is not an "anti-prostitution and sex-trafficking" campaign. A more apt analogy would amend the hypothetical to require a "Just Say No" grant recipient to adopt a policy position *subsidiary* to the anti-drug use objective, such as opposing the depiction of drug use in movies, television, and video games because the government believes there is an association between such depictions and teenage substance abuse.[23]

The apartheid hypothetical also fails. It describes the program as one "to address racial violence" and claims the right to limit funding to organizations that adopt a policy "opposing apartheid," because Congress "belie[ved]" that apartheid was a cause of racial violence. Pet. Br. 32. The

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a Code of Conduct prohibiting racial discrimination); *see generally* Jeff Walker, Economic Sanctions: United States Sanctions Against South Africa – Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, 100 Stat. 1086 (1986), 28 Harv. Int'l L.J. 117, 120 (1986) (explaining that the Comprehensive Anti-Apartheid Act prohibited new investments and loans to South Africa).

23. *See, e.g.*, Johns Hopkins Children's Center, *2011: Media and Adolescent Substance Abuse* (Mar. 16, 2011), http://www.hopkinschildrens.org/media-and-adolescent-substance-abuse.aspx.

hypothetical's generality provides no basis for evaluating the message compelled, its relationship to the "anti-racial violence" program or government determinations about how opposing apartheid advances those goals. In the government's view, these questions are irrelevant because there need be no meaningful First Amendment inquiry *at all.*

If the government can require a private party to adopt an "anti-apartheid" position pursuant to a general anti-racial violence campaign without First Amendment review, there is no reason it could not require "anti-racial violence" grantees to adopt other subsidiary positions. Under this logic, grantees could be required to express support for particular democratic norms, such as majority-minority electoral districts, if the government believes that greater diversity among government officials reduces racial tension. Or they could be required to support hate speech restrictions and hate crime laws, on the theory that they help reduce racial violence.

The Court should not bless the government's Orwellian attempt to control private beliefs. Applying the First Amendment to demands like the Policy Requirement will not disable the government from speaking or from imposing appropriate restrictions that can survive First Amendment review. This Court must not expand the government speech doctrine, because doing so will allow the Spending Clause to swallow the First Amendment.

CONCLUSION

The Court should apply the First Amendment to invalidate the Policy Requirement.

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